1674 (32) 1675 (21)

No. 02-1674 et al.

Supreme Court, U.S.
FILED
AUG 5 - 2003
Aug 5 2003
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

SENATOR MITCH MCCONNELL, ET AL.,

Appellants,

v.

FEDERAL ELECTION COMMISSION, ET AL.,

Appellees.

On Appeal from the United States District Court For The District of Columbia

BRIEF OF *AMICI CURIAE* THE INTERFAITH ALLIANCE FOUNDATION; THE GENERAL SYNOD OF THE UNITED CHURCH OF CHRIST; THE UNION OF AMERICAN HEBREW CONGREGATIONS; THE UNITARIAN UNIVERSALIST ASSOCIATION; NETWORK, A NATIONAL CATHOLIC SOCIAL JUSTICE LOBBY; AND THE CENTRAL CONFERENCE OF AMERICAN RABBIS IN SUPPORT OF APPELLEES

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INTEREST OF *AMICI CURIAE**

The Interfaith Alliance Foundation (the "Foundation"), serving in partnership with The Interfaith Alliance, is a non-partisan, educational institution that provides training, education, research, and other support to a growing network of clergy and people of faith from more than 65 different religious traditions. Through public education and advocacy of reform measures, the Foundation strives to promote a fair and balanced campaign finance system in which ordinary citizens, including people of faith, participate meaningfully in civic and political life. The Foundation is deeply interested in the outcome of this litigation because the weakening of campaign finance reform stands to impede numerous people of faith and good will from engaging in national political activity.

The General Synod of the United Church of Christ, a representative body of the 1.3 million members of the United Church of Christ, has a deep and compelling interest in protecting civic life as expressed through the

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* *Amici curiae* state that no party or its counsel has authored this brief in whole or in part, and no person or entity other than *amici*, their members, or their counsel have made any monetary contribution to its preparation. This brief is filed with the consent of all parties, and copies of the consent letters have been lodged with the Clerk of this Court.

In addition, counsel for *amici curiae* acknowledge with appreciation the invaluable assistance with the research and writing of this brief provided by Joseph Landau, Sanjay Mody, and Stephen M. Rich, associates at Cleary, Gottlieb, Steen & Hamilton who have not yet been admitted to the bar, and Michael Kavey, a summer associate at Cleary, Gottlieb, Steen & Hamilton who is a member of the class of 2004 at Yale Law School.

electoral system and the voting process in the United States. In a 1997 Resolution entitled "Campaign Finance Reform," the General Synod addressed the threat to our democratic process by "the present system of financing campaigns for public office . . . that allows for the appearance of improper influence in the legislative process by large contributors and correspondingly discourages participation by persons of lesser means." The 1997 General Synod of the United Church of Christ also resolved to "support legislation which seeks more equitable campaign financing."

The Union of American Hebrew Congregations ("UAHC") is the central body of the Reform Jewish Movement in North America, composed of 900 Reform congregations encompassing some 1.5 million Reform Jews. Campaign finance reform is not an esoteric technical issue of election regulations, but one that goes to the essence of the ethical and moral fiber of our nation. The millions of dollars that flow into federal elections have created a major problem that threatens the integrity of our democratic process. In 1984, the UAHC recognized that "Congress must legislate an end to this financial influence race." The UAHC supports the Bipartisan Campaign Reform Act as a vital step toward creating a vibrant and participatory American democracy where financial means does not determine a citizen's political influence.

The Unitarian Universalist Association is a religious association of more than 1,000 congregations in the United States and elsewhere. The Association democratically adopts resolutions consistent with its fundamental principles and purposes and has taken positions supporting campaign finance reform, including a resolution in 2000

calling for campaign finance reform at the state and federal levels.

NETWORK, A National Catholic Social Justice Lobby ("NETWORK") of more than 12,000 individual and organizational members, lobbies, educates, and organizes to promote federal legislation creating social and economic opportunity. Since 1971, NETWORK has worked to create a just, democratic society in which all members have a part in the decision-making process. The campaign finance system has seriously jeopardized the trust of citizens, the health of our democracy, and the ability of all citizens to participate effectively in the political process. The undue influence of money in campaigns diminishes the voting power of ordinary citizens, and especially those who are poor.

The Central Conference of American Rabbis ("CCAR") is the organized Rabbinate of Reform Judaism, composed of 1,800 Reform rabbis. The Jewish tradition speaks clearly and unhesitatingly to the critical importance of appointing leaders according to their merit and fostering the ability of leaders to act independently for the public good, unfettered by the demands of the wealthy. Jewish texts and common sense teach that a democracy only can function properly when elected officials are equally accountable, and equally responsive, to all citizens, without regard to those citizens' abilities to make large campaign contributions. The existing campaign finance system benefits the extraordinarily wealthy, reduces voter access to elected officials, erodes moral standards in government agencies and institutions, and breeds distrust and alienation. In 1997, the CCAR resolved to "[s]upport the general principles outlined in

the Bipartisan Campaign Finance Reform Act of 1997," and the CCAR continues to support the version of that act that was enacted into law in 2002.

SUMMARY OF ARGUMENT

Amici curiae urge the Court to uphold the constitutionality of the Bipartisan Campaign Reform Act, Pub. L. No. 107-155, 116 Stat. 81 (2002) ("BCRA"), vital legislation that will help restore public confidence in the political system and enable ordinary citizens to participate meaningfully in the democratic process. Faith-based organizations like *amici*, as well as their constituents and members, share in a proud tradition of conscientious political participation and public service that will be impaired without a strong and effective system of campaign finance regulation. Fostering responsible and moral governance requires elected officials who focus on the needs of their constituents, not sources of funding. Respect for individual dignity requires that all citizens have confidence that their direct political participation—the giving of their hearts and minds, not just their dollars—can positively affect how our nation is governed. The integrity and vitality of our democracy require that ordinary citizens, including people of faith, are allowed a meaningful voice in the political process.

1. Widespread distrust of elected officials and decreased voter turnout in the years leading up to BCRA's enactment demonstrated that our democratic process was badly in need of reform. Opinion polls have revealed a broad public perception of corruption and a general sentiment among voters that they cannot make a difference in the

political system as it has been operating. The failings of the pre-BCRA system have been of particular concern to communities of faith, since honesty, fairness, and integrity are universal religious values. Indeed, as of 2001, 60% of people of faith believed that the pre-BCRA campaign finance system needed either a "complete overhaul" or "major changes," while only 10% believed that the system was acceptable in its existing state. Only 10% of people of faith believed they had the ability to make a major difference in the political system, while an overwhelming 61% believed that they personally lacked the ability to make much of a difference in the political process at all. With this in mind, religious leaders from a broad and diverse array of faith traditions have been outspoken in favor of reform.

2. As the Supreme Court has consistently recognized, the government has a compelling interest in building public trust in the political process and encouraging active citizen participation. Ordinary citizens are likely to lose confidence in the electoral process if they lack faith that their votes and voices "count" equally in the eyes of elected officials and the law. To advance these compelling interests, it is crucial that Congress be able to regulate political campaigns not only to eliminate *quid pro quo* corruption, but also to minimize the perception of undue influence and the notion that individual citizens are incapable of making a difference. The very foundations of democracy are threatened when ordinary citizens believe their voices will be drowned out by special interests.

3. BCRA directly address these interests and concerns. With provisions that rein in "soft money" contributions, tighten the regulation of "issue ads" that appear immedi-

ately before elections, and expand disclosure requirements, the newly enacted reforms closely target those elements of the preexisting campaign finance system that have contributed most to the perception among individual citizens that their votes and voices "count" less than those of financially powerful interest groups. Empirical data shows that people of faith believe that the reforms embodied in BCRA will improve the integrity of our political system.

ARGUMENT

I. LARGE SEGMENTS OF THE PUBLIC, INCLUDING SIGNIFICANT NUMBERS OF PEOPLE OF FAITH, LACKED CONFIDENCE IN THE PRE-BCRA POLITICAL PROCESS AND CAMPAIGN FINANCE SYSTEM

Amici represent people of faith from more than 65 different religious traditions. They are concerned with the morality of government, the potential for corruption among our leaders, and the disillusionment and alienation that prevail among the electorate on the issue of campaign finance. Honesty, fairness for all, and integrity—the very principles that BCRA seeks to return to our nation's political system—are also three universal religious values that have informed some of the highest traditions of political participation and public service in our nation's history. A government that claims to represent the public interest but fails to reflect these values can have no moral legitimacy in the eyes of Americans of faith and will fail to inspire its citizens to participate actively and conscientiously in public affairs.

The ineffectiveness of the campaign finance system in place before enactment of the BCRA contributed significantly to this disaffection among people of faith and other citizens. The perception that many elected officials had become beholden to particular interests that use large "soft money" contributions, so-called "issue ads," and coordinated expenditures to evade existing campaign finance regulations diminished public trust in the integrity and effectiveness of those regulations and led ordinary citizens to lose confidence in their ability to participate effectively in the political process.

A. The Pre-BCRA System Gave Rise to a Widespread Perception of Corruption

The pre-BCRA campaign finance system produced a widespread perception that financially powerful interests exercised undue, even corrupting influence on the electoral system and government officials. Statements from a broad range of religious leaders confirm a widespread public perception that unregulated "soft money" contributions do not differ significantly in their impact from outright *quid pro quo* corruption. One ecumenical Protestant group has stated that the pre-BCRA system created "an environment where public officials [were] beholden to contributors in ways that border on bribery." Protestants for the Common Good, *Why Should Christians Care About Campaign Finance Reform?* (2000), *at* http://www.thecommongood.org/campaign_finance.html. The Methodist Church has decried the "pouring of tens of millions of dollars into political campaigns to buy special influence with legislators" as "a national scandal." Interfaith Alliance Foundation, *Study Paper: Campaign Finance Reform* 13 (2002), *available at* http://www.inter-

faithalliance.org/Files/getFile.cfm?id=4645. The Religious Action Center of Reform Judaism has criticized "the pernicious influence of money in our electoral system, which often allows moneyed interests to dominate the political debate," adding that "[w]e cannot accept an electoral system that structurally and systematically favors the richest among us." Press Release, Religious Action Center of Reform Judaism, Reform Jewish Leader Welcomes House Breakthrough on Campaign Finance Reform (Jan. 24, 2002), *at* http://www.rac.org/news/012402.html.

The sense of urgency surrounding this issue is further demonstrated by collective reform efforts undertaken by religious groups. In connection with their efforts to reform the campaign finance system, more than 250 leaders from a diverse array of religious organizations took the unusual step of constituting an issue-based coalition, Religious Leaders for Campaign Finance Reform ("RLCFR"). In 2001, this broad coalition issued a joint letter to Congress urging passage of meaningful reform measures and warning that "the current campaign finance system . . . gives the appearance that political access and favors are for sale to the highest bidder." Letter from Religious Leaders for Campaign Finance Reform, to the United States Senate (Mar. 16, 2001), *at* http://www.ncccusa.org/news/01news25a.html. The religious leaders who signed the letter represented Catholics, Presbyterians, Methodists, Baptists, Evangelical Lutherans, Episcopalians, Greek Orthodox Christians, Quakers, Jews, and others. Signatories included the national leaders of 17 mainstream religious groups, ranging from the National Baptist Convention to the Union of American Hebrew

Congregations.[1] The RLCFR had previously written a letter to Congress in 1997 lamenting that the "present system gives at least the appearance that the President, Senators and Representatives are willing to sell their values and votes, as well as the integrity of their offices, for the sake of campaign contributions." Letter from the Religious Leaders for Campaign Finance Reform, to Congress (Feb. 13, 1997), *available at* http://www.wfn.org/1997/02/msg00149.html (hereinafter "1997 RLCFR Letter").

Concerns about corruption and support for campaign finance reform have not, of course, been limited to the leaders of faith-based organizations. Lay people of faith—from across the political spectrum, *see infra* n.2—also have perceived an urgent need to cleanse the campaign finance system of corruption and undue influence.

[1] The religious leaders who signed the letter included the Presiding Bishop of the Evangelical Lutheran Church in America, the General Secretary of the National Council of the Churches of Christ in the USA, the General Secretary of the Reformed Church in America, the Presiding Bishop and Primate of the Episcopal Church in the United States, the General Minister and President of the Christian Church (Disciples of Christ) in the United States and Canada, the Minister General of the Franciscan Friars of the Atonement, the General Secretary of American Friends Service Committee, the Executive Director of the Church of the Brethren General Board, the Primate of the Antiochian Orthodox Christian Archdiocese of North America, the President of the Moravian Church in America (Southern Province), the President of the National Baptist Convention, the Diocesan Bishop of the Mar Thoma Church, the President of the United Church of Christ, the President of the Union of American Hebrew Congregations, and ecumenical officers from the Greek Orthodox Archdiocese of America, the Council of Bishops of the United Methodist Church, and the Christian Methodist Episcopal Church.

According to a 2001 Gallup Organization public opinion study of clergy and people of faith, commissioned by *amicus curiae* The Interfaith Alliance Foundation, a solid majority (60%) of people of faith believe that the pre-BCRA campaign finance system needed either a "complete overhaul" or "major changes," while only 10% believe that the system was fine as it was. The Gallup Organization, *Campaign Finance Reform: Opinions of People of Faith and the Clergy* 7 (Aug. 2001) (hereinafter "Gallup Poll"), *available at* http://www.callforreform.org/gallup.pdf.[2] More than 85% of people of faith say that campaign finance reform, in comparison to other key political issues like education and taxes, is either very important (54%) or somewhat important (32%). *Id.* Given these numbers, it is hardly surprising that religious leaders from such a broad variety of faiths have actively and visibly taken public stances on this issue and have

[2] The Gallup Organization interviewed a nationally representative sample of 1,202 people of faith and a nationally representative sample of 303 clergy. "People of faith" were those who indicated that (1) they attended religious service at least once a month, or that (2) religion was "very important" to them. The samples were weighted by age, race, gender, education, and geographical region, in accordance with previous Gallup surveys that had used the same screening questions. Gallup Poll at 4.

The samples also represented a broad range of political ideologies. Among people of faith sampled, 41% described themselves politically as either "very conservative" or "somewhat conservative," 36% described themselves as "moderate," and 19% described themselves as either "very liberal" or "somewhat liberal." *Id.* at 6. Among clergy sampled, 54% described themselves politically as either "very conservative" or "conservative," 21% described themselves as "moderate," and 13% described themselves as either "very liberal" or "liberal." *Id.* at 6.

strongly supported reform of the nation's campaign finance laws.[3]

The views of people of faith are in accord with the overwhelming support for reform among the American people, a decisive majority of which lacked confidence in the pre-BCRA campaign finance system. One major poll showed that two-thirds of Americans believed that campaign finance laws either required "major changes" or needed to be "completely overhauled." Carl M. Cannon, *A Rough Ride for Reform*, Nat'l Journal, Jan. 29, 2000, *at* 320. More than 70% of the public believed members of Congress sometimes vote based on the desires of large contributors to their political parties, even when doing so is not in the country's best interest and when it is not what their constituents support. Defendant-Intervenors' Excerpts of Reply Brief (Redacted Version for Public Distribution) at I-6, *McConnell v. FEC*, 251 F. Supp. 2d 176 (D.D.C. 2003). Almost 80% of the public believed "big party contributions" have either a "great deal of impact" (55%) or "some impact" (23%) on decisions made by the federal government. Only 6% believed such contributions do not have much or any impact. Press Release, The Reform Institute for Campaign and Election Issues, On the Docket: Campaign Finance and the Courts (Sept. 24, 2002), *at* http://www.reforminstitute.org/cgi-data/article/files/39.shtml.

[3] For example, 52% of clergy support a ban on soft money donations, while 31% oppose such a ban. Sixty-four percent prefer strict limits on contributions in addition to disclosure requirements over disclosure requirements alone. Gallup Poll at 10, 13.

B. The Pre-BCRA Campaign Finance System Created a Widespread Perception That Ordinary Citizens Cannot Meaningfully Participate in the Political Process

With a campaign finance system widely viewed as broken and corrupt, it is hardly surprising that average citizens tend to feel they cannot make a significant difference by participating in political life. Only 10% of people of faith believe they can make a major difference in the political system as it has been operating. Gallup Poll at 9. By contrast, 61% feel that they personally can make little or no difference. *Id.* While the legitimacy of our democratic government is premised on the existence of broad and active political participation, citizens who feel politically powerless can hardly be expected to vote in high numbers or otherwise actively engage themselves in the political process. As noted by the RLCFR, "[i]f citizens feel their efforts are futile in the face of economic and other forces that overwhelm them, hope for the democratic process is destroyed." 1997 RLCFR Letter. Indeed, this Court itself has observed that the perception that "large donors call the tune" can "jeopardize the willingness of voters to take part in democratic governance. Democracy works 'only if the people have faith in those who govern.'" *Nixon v. Shrink Mo. Gov't PAC*, 528 U.S. 377, 390 (2000) (internal citation omitted).

The Gallup Poll statistics call into question any notion that Americans of faith are indifferent to reform or otherwise fear it will impede their political participation. For example, 58% of people of faith believe campaign finance reform will give the average citizen a greater voice in

the political process, while only 11% believe that it will give the average citizen less of a voice. Gallup Poll at 16. Fifty-seven percent of people of faith believe campaigns will become more competitive with campaign finance reform, while only 16% believe they will be less competitive. *Id.* These statistics demonstrate that people of faith do not agree with the claims made by opponents of reform—including some religious special interest groups—that campaign regulations somehow stifle debate or inhibit political expression. Indeed, the overwhelming majority of people of faith (78%) expressly reject the notion that campaign finance reform would interfere with their right to free speech. *Id.* at 18.

II. THE GOVERNMENT HAS A COMPELLING INTEREST IN BUILDING PUBLIC CONFIDENCE IN THE POLITICAL PROCESS AND ENCOURAGING CITIZEN PARTICIPATION

It is clear, therefore, that the pre-BCRA system fostered serious doubts among people of faith and other citizens about their ability to participate effectively in the nation's democratic processes. By enacting BCRA, in the exercise of its constitutional power to regulate federal elections, Congress squarely sought to address this troubling condition. This Court has long recognized that "preserv[ing] . . . the individual citizen's confidence in government" and "'sustain[ing] the active, alert responsibility of the individual citizen in a democracy for the wise conduct of government' are interests of the highest importance" that Congress may legitimately seek to advance when regulating federal elections. *First Nat'l*

Bank of Boston v. Bellotti, 435 U.S. 765, 788-89 (1978); *see Shrink Mo. Gov't PAC*, 528 U.S. at 401 (Breyer, J., concurring) (recognizing that campaign finance system may be regulated in order to advance compelling government interests in "build[ing] public confidence in [the electoral] process and broaden[ing] the base of a candidate's meaningful financial support, encouraging the public participation and open discussion that the First Amendment itself presupposes"); *Buckley v. Valeo*, 424 U.S. 1, 27 (1976) (per curiam) ("Congress could legitimately conclude that the avoidance of the appearance of improper influence" is "critical" in order to maintain "'confidence in the system of representative Government'" (quoting *United States Civil Serv. Comm'n v. Nat'l Ass'n of Letter Carriers*, 413 U.S. 548, 565 (1973))); *United States v. Int'l Union UAW-CIO*, 352 U.S. 567, 590 (1957) (recognizing compelling government interest "to protect the political process from undue influence of large aggregations of capital and *to promote individual responsibility for democratic government*" (emphasis added)).

In legislating to advance this compelling interest, Congress legitimately concluded that because an individual citizen's "right of suffrage can be denied by a debasement or dilution of the weight of a citizen's vote just as effectively as by wholly prohibiting the free exercise of the franchise" itself, *Reynolds v. Sims*, 377 U.S. 533, 555 (1964), ordinary citizens are likely to lose confidence in the electoral process if they lack faith that their votes and voices "count" equally in the eyes of elected officials and the law. *See Shrink Mo. Gov't PAC*, 528 U.S. at 390 (recognizing compelling interest in preventing "the cynical

assumption that large donors call the tune" from "jeopardiz[ing] the willingness of voters to take part in democratic governance"); *see also Bush v. Gore*, 531 U.S. 98, 104 (2000) ("The right to vote is protected in more than the initial allocation of the franchise."); *Moore v. Ogilvie*, 394 U.S. 814, 819 (1969) ("The idea that one group can be granted greater voting strength than another is hostile to the one man, one vote basis of our representative government."); *Wesberry v. Sanders*, 376 U.S. 1, 17-18 (1964) ("No right is more precious in a free country than that of *having a voice* in the election of those who make the laws under which, as good citizens, we must live." (emphasis added)). Because "viable" representative government demands "[f]ull and effective participation by all citizens" in the political process, Congress legitimately may regulate the campaign finance system to ensure that citizens remain sufficiently confident that they have "equally effective voice[s]" in the electoral process to maintain participation at the levels necessary to sustain democratic government. *Reynolds*, 377 U.S. at 565; *see FEC v. Colo. Repub. Fed. Campaign Comm.*, 533 U.S. 431, 441 (2001) (Congress may legitimately regulate campaign finance system in order to curb "undue influence on an officeholder's judgment, and the appearance of such influence"); *Austin v. Mich. Chamber of Commerce*, 494 U.S. 652, 659-60 (1990) (recognizing compelling government interest in restricting ability of corporations to use state-created advantages "to obtain 'an unfair advantage in the political marketplace'" (quoting *FEC v. Mass. Citizens for Life, Inc.*, 479 U.S. 238, 257 (1986))).

In *Buckley*, this Court sustained provisions of the Federal Election Campaign Act[4] ("FECA") that, *inter alia*, (1) set forth limits on political contributions and (2) mandated disclosure and reporting of the sources of such contributions, on the ground that each furthered the government's compelling interest in cultivating public confidence in the electoral process. The Court expressly rejected the petitioners' argument that bribery laws and narrowly drawn disclosure requirements constituted a sufficient alternative to contribution limits, observing that criminal penalties "deal with only the most blatant and specific attempts of those with money to influence governmental action" and that disclosure requirements were only a "partial measure" in combating electoral corruption. *Buckley*, 424 U.S. at 28.[5] Thus, the Court concluded that political contribution limits substantially advanced Congress's compelling interest in building public confidence in the electoral process by minimizing both the opportunity for undue influence and the perception of such influence in the eyes of the public. *Id.* at 26-29.

The Court also recognized three categories of compelling governmental interests furthered by FECA's disclosure requirements. First, disclosure "aid[s] the voters

[4] Federal Election Campaign Act of 1971, Pub. L. No. 92-225, 86 Stat. 3 (1972), as amended by the Federal Election Campaign Act Amendments of 1974, Pub. L. No. 93-443, 88 Stat. 1263 (1974).

[5] In *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652, 660 (1990), the Court expanded this rationale to capture the regulation of campaign expenditures, because "[c]orporate wealth can unfairly influence elections when it is deployed in the form of independent expenditures, just as it can when it assumes the guise of political contributions."

in evaluating those who seek federal office," allowing "voters to place each candidate in the political spectrum more precisely" and "alert[ing] the voter to the interests to which a candidate is most likely to be responsive and thus facilitat[ing] predictions of future performance in office." *Id.* at 66-67. Second, the *Buckley* Court echoed Justice Brandeis in concluding that "disclosure requirements deter actual corruption and avoid the appearance of corruption by exposing large contributions and expenditures to the light of publicity." *Id.* at 67 (citing L. Brandeis, *Other People's Money* 62 (Nat'l Home Library Found. ed. 1933)). Third, the Court concluded that "disclosure requirements are an essential means of gathering the data necessary to detect violations of the contribution limitations." *Id.* at 68. Advancement of each of these interests in turn bolsters public confidence in the electoral system. For example, greater transparency regarding the sponsorship of candidate-specific advertisements mitigates the suspicion and confusion caused by advertisements funded by pseudonymous organizations with vague or unclear connections to the candidates themselves. Disclosure requirements hinder advocacy groups' efforts to disguise their alliances or manufacture impressions of broad, grassroots support using corporate dollars. By deterring interest groups from engaging in such deception and mandating greater accountability for campaign-related speech, disclosure requirements decrease voter alienation and increase public confidence in our political system.

Two terms after *Buckley*, the Court reaffirmed that the preservation of "the individual citizen's confidence in government" is a public concern "of the highest importance." *Bellotti*, 435 U.S. at 789. For that reason, the

Court cautioned that where evidence demonstrates that "undue influence" by financially powerful interests tends to "destroy the confidence of the people in the democratic process and the integrity of government" by "drown[ing] out other points of view . . . [and] thereby denigrating rather than serving First Amendment interests," such arguments merit careful consideration. *Id.* In addition, the *Bellotti* Court powerfully reiterated the interest in disclosure announced in *Buckley*, stating that in "judging and evaluating the relative merits of conflicting arguments," the electorate "may consider . . . the source and credibility of the advocate," and that "[i]dentification of the source of advertising may be required as a means of disclosure, so that the people will be able to evaluate the arguments to which they are being subjected." *Id.* at 791-92.

Since that time, the Court has made clear that for Congress to advance its compelling interests of ensuring public confidence in the electoral process and facilitating meaningful citizen participation, it must be able to prevent circumvention of the mechanisms it has chosen to promote those interests in the first instance. *See FEC v. Beaumont*, 123 S. Ct. 2200, 2207 (2003) ("[R]ecent cases have recognized that restricting contributions by various organizations hedges against their use as conduits for circumvention of [valid] contribution limits.") (internal quotation omitted) (alteration in original); *Colo. Repub. Fed. Campaign Comm.*, 533 U.S. at 456 (noting that "all members of the Court agree" that preventing circumvention of regulation is an "important government interest") (internal quotation omitted); *Austin*, 494 U.S. at 664 (refusing to grant non-profit corporations an exemption from expenditure limits in part because such an exemption would allow for-profit corporations to circumvent those limits); *Cal. Med. Ass'n v. FEC*, 453 U.S. 182, 197-98, 199 (1981) (finding that Congress could place limits on contributions to political committees as a means of "prevent[ing] circumvention of the very limitations on contributions [to candidates] that [the] Court upheld in *Buckley*"); *Buckley*, 424 U.S at 47 ("[C]ontribution ceilings . . . prevent attempts to circumvent [FECA] through prearranged or coordinated expenditures amounting to disguised contributions.").

For example, the Court has recognized that groups exercising undue influence may forsake blatant *quid pro quo* arrangements and instead use more sophisticated tactics of influence peddling and misdirection to secure their particular objectives. *Austin*, 494 U.S. at 659-60 (finding that Michigan's regulation of independent expenditures fulfilled a compelling interest in ameliorating "the corrosive and distorting effects of immense aggregations of wealth . . . accumulated with the help of the corporate form . . . that have little or no correlation to the public's support for the corporation's political ideas," regardless of whether Michigan had also demonstrated a viable threat of "'financial *quid pro quo*' corruption" (citations omitted)); *see also Buckley*, 424 U.S. at 28 (rejecting argument that Congress is limited to "partial measure[s]" that "deal with only the most blatant and specific attempts . . . to influence governmental action" when it legislates to ensure integrity of the political process). Drawing upon *Buckley*, the Court also has paid close attention to attempts to circumvent existing campaign finance regulations through the use of "the 'special characteristics of the corporate structure'" in a

manner that "threaten[s] the integrity of the political process," and accordingly has endorsed "the public interest in 'restrict[ing] the influence of political war chests funneled through the corporate form.'" *Beaumont*, 123 S. Ct. at 2206 (alteration in original) (quoting *FEC v. Nat'l Conservative Political Action Comm.*, 470 U.S. 480, 500-01 (1985)); *see also Austin*, 494 U.S. at 659 ("[S]tate-created advantages . . . permit [corporations] to use resources amassed in the economic marketplace to obtain an unfair advantage in the political marketplace." (internal quotation marks and citation omitted)).

Unless congressional action to close the obvious loopholes in its chosen scheme of campaign finance regulation is sustained, public cynicism and alienation from the political process will increase even further as a result of the disconnect between what the law facially purports to regulate and the reality of powerful individuals and institutions circumventing its provisions. As demonstrated by the district court record and reinforced by the evidence presented by *amici* in this brief, *see supra* Point I, that is precisely what has happened in the years since *Buckley* and *Bellotti* were decided.

In enacting BCRA, Congress explicitly sought, in the exercise of its constitutional power to regulate federal elections, to "restor[e] Americans' faith in the electoral process and [to] decreas[e] public cynicism about our system of government." Brief of Appellants at 18, *Adams v. FEC*, *prob. juris. noted*, 123 S. Ct. 2270 (2003) (No. 02-1740-ATX) (internal quotation marks and citations omitted). In this context, Congress's legislative judgment that BCRA is necessary (1) to preserve the integrity and

effectiveness of its overall scheme of campaign finance regulation, and (2) to build confidence among ordinary citizens in the integrity of that scheme and their own abilities to participate meaningfully in public life, is entitled to deference. *Cf. Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 665-66 (1994) (noting that "the predictive judgments of Congress" should not be ignored "'simply because [appellants] cas[t] [their] claims under the umbrella of the First Amendment,'" since "Congress is far better equipped than the judiciary to 'amass and evaluate the vast amounts of data' bearing upon an issue as complex and dynamic as that presented here" (alteration in original and citations omitted)).

III. BCRA ADVANCES THE GOVERNMENT'S COMPELLING INTERESTS IN IMPROVING PUBLIC CONFIDENCE IN THE POLITICAL SYSTEM AND FACILITATING CITIZEN PARTICIPATION

The district court record contains volumes of evidence documenting the use of large, unregulated soft money donations by financially powerful interests to secure undue influence over federal elections and elected officials. These large soft money contributions foster corruption and the appearance of corruption, undermining public confidence in the integrity of our political system. People of faith share the general public's concern about soft money and support campaign finance reform that includes stricter contribution limits. Of those surveyed in the 2001 Gallup Poll, 71% of people of faith and 64% of clergy favor strict limits on contributions in addition to full disclosure about campaign contributions. Gallup Poll

at 13. Moreover, a plurality (40%) of people of faith and a majority (52%) of clergy support a ban on soft money. *Id.* at 10.

People of faith believe that tighter restrictions on contributions and stricter disclosure requirements would strengthen the integrity of our political system and the ability of average citizens to participate meaningfully in the political process. For example, when asked their views about the effects of imposing stricter limits on contributions and stricter disclosure requirements,

- 62% of people of faith and 63% of clergy responded that such reforms would make the American political system work better;
- 59% of both people of faith and clergy surveyed believe such reforms would result in more ethical and honest conduct by members of Congress; and
- 58% of people of faith and 56% of clergy responded that such reforms would give the average citizen a stronger voice in the political process.

Id. at 15-16.

BCRA's provisions directly address the most significant loopholes used to circumvent Congress's existing campaign finance regulations. Title I of BCRA addresses real and perceived corruption by closing the "soft money" loophole that had made FECA's restrictions virtually irrelevant in the eyes of the public. Its provisions require that all money raised by national political parties be "hard money" raised from sources and in amounts regulated by FECA, and applies the same restriction to state political parties to the extent their activities influence

federal elections.[6] BCRA § 101, amending FECA § 323, 2 U.S.C. § 441i. By closing off the most significant avenue for large contributors to exert undue influence on the federal political system, the soft money restrictions in Title I will bolster the confidence of the American people, including people of faith, in the political system. Ordinary citizens will be less likely to believe that the influence of big donors renders their own participation in the political system meaningless and thus will be encouraged to participate. Reducing the perception of corruption and disenfranchisement among ordinary citizens will thus improve the vitality and strength of our democracy.

Title II of BCRA closes two major loopholes that previously allowed widespread circumvention of the source restrictions and disclosure rules of FECA: sham "issue ads" and coordinated expenditures. Corporations, unions, and other interest groups—like political parties—have in recent years spent significant amounts on advertisements purporting to address issues rather than expressly advocate the election or defeat of a candidate for public office. Although these expenditures generally had both the intent and effect of influencing federal elections, they fell outside FECA's definition of "independent expenditures" and thus outside its source restrictions and disclosure rules, because they did not "expressly advocat[e] the

[6] In the so-called "Levin Amendment," BCRA does allow state and local parties to spend limited soft money donations, in combination with hard money, on voter registration and mobilization activities that do not mention federal candidates. BCRA § 101(a), amending FECA § 323(b)(2), 2 U.S.C. § 441i(b)(2). The Levin Amendment enhances the resources at the disposal of state and local parties to pursue voter turnout efforts, while avoiding the abuses that accompanied the use of unlimited soft money to finance these activities.

election or defeat of a clearly identified candidate." 2 U.S.C. § 431(17) (defining "independent expenditure"); *FEC v. Mass. Citizens for Life, Inc.*, 479 U.S. 238, 245-49 (1986).

The provisions of Title II close this loophole by extending those source limitations and disclosure rules to "electioneering communications," defined in the first instance to include broadcast advertisements that refer to a clearly identified candidate for federal office and are targeted at that candidate's electorate within 60 days prior to a federal general election or 30 days before a federal primary election. Congress also provided a "back-up" definition that would become effective if the original definition were held unconstitutional, as the district court concluded in this case. *McConnell v. FEC*, 251 F. Supp. 2d 176, 184-85 (D.D.C. 2003). Under the backup definition, an electioneering communication is defined as "any broadcast, cable, or satellite communication which promotes or supports a candidate for that office, or attacks or opposes a candidate for that office (regardless of whether the communication expressly advocates a vote for or against a candidate) and which also is suggestive of no plausible meaning other than an exhortation to vote for or against a specific candidate." BCRA § 201(a), amending FECA § 304, 2 U.S.C. § 434(f)(3)(A)(ii). Corporations and unions may not use their treasury funds to run advertisements that qualify as "electioneering communications," and any individual or group spending more than $10,000 per year on such advertisements must file a report with the Federal Election Commission ("FEC") disclosing the identity of the sponsor of each advertisement and other information. BCRA § 201(a), amending

FECA § 304, 2 U.S.C. § 434(f)(1)-(2). Unions and corporations remain free to fund electioneering communications through sponsored political action committees.

In order to prevent circumvention through unregulated coordinated expenditures, Title II also adjusts what expenditures in support of a candidate are to be considered "coordinated" and thus subject to FECA. As this Court recognized in *Buckley*, expenditures coordinated with candidates may be regulated in order to prevent circumvention of contribution limits. *Buckley*, 424 U.S. at 47. The Court distinguished between expenditures "made totally independently of the candidate and his campaign" and those made "in cooperation with or with the consent of a candidate, his agents or an authorized committee of the candidate." *Id.* at 47 & n.53. Since *Buckley*, the Court has reaffirmed the proposition that unrestricted expenditures on behalf of a candidate that are coordinated with that candidate or her agents pose the same danger to the integrity and perceived integrity of the electoral system as unrestricted direct contributions. *E.g.*, *Colo. Repub. Fed. Campaign Comm.*, 533 U.S. at 464 (noting that there exists "no significant functional difference between a party's coordinated expenditure and a party's direct contribution"). Section 214 of Title II repeals the narrow definition of "coordination" adopted by the FEC and directs it to issue new regulations. Congress provided that these new regulations "shall not require agreement or formal collaboration to establish coordination."[7] BCRA § 214(c), 2 U.S.C. § 441a note. Section 214 also

[7] The FEC issued regulations pursuant to this directive on January 3, 2003. Coordinated and Independent Expenditures, 68 Fed. Reg. 421 (Jan. 3, 2003).

expands the definition of coordinated expenditures to designate independent expenditures made in coordination with a national, state, or local committee of a political party as contributions to such a committee. BCRA § 214(a), amending FECA § 315(a)(7)(B), 2 U.S.C. § 441a(a)(7)(B). Section 213 requires political parties to choose between making coordinated expenditures in support of a candidate under 2 U.S.C. § 441a(d) or making "independent" expenditures in support of the candidate. BCRA § 213, amending FECA § 315(d), 2 U.S.C. § 441a(d).

Title II's independent expenditure provisions prevent circumvention of FECA's existing source and contribution limits and disclosure requirements, which this Court has long recognized advance the government's compelling interest in preventing the appearance and reality of corruption in the electoral system. *See, e.g., Buckley*, 424 U.S. at 25-27, 66-68. Unless the significant loopholes relating to sham issue ads and coordinated expenditures are closed, congressional regulation of candidate financing will be largely ineffectual. Large contributors will retain undue influence, and public perceptions of corruption and disenfranchisement will persist.

In addition to closing loopholes related to contribution limits, BCRA includes several new disclosure requirements that the plaintiffs challenge as unconstitutional. With respect to electioneering communications, section 201 of BCRA mandates disclosure regarding disbursements funding electioneering communications that total more than $10,000 in a year. The required disclosure includes the identity of the person making the disbursement, principal place of business if not an individual, and

the names and addresses of persons who have donated $1,000 or more to the disbursing fund. BCRA § 201(a), amending FECA § 304, 2 U.S.C. § 434(f)(2). With respect to independent expenditures, section 212 of BCRA requires reports regarding expenditures or contracts to make independent expenditures that total $1,000 or more after the twentieth day prior to a federal election. BCRA § 212, amending FECA § 304, 2 U.S.C. § 434(g).

Finally, BCRA requires the clear identification within an advertisement of the sponsors of any electioneering communication. Section 311 amends FECA to provide that electioneering communications must either clearly identify the candidate or political committee that authorized the advertisement or, if not authorized by a candidate or her committee, "clearly state the name and permanent street address, telephone number, or World Wide Web address of the person who paid for the communication and state that the communication is not authorized by any candidate or candidate's committee." BCRA § 311(1), amending FECA § 318(a)(3), 2 U.S.C. § 441d(a)(3).

These expanded disclosure requirements advance several compelling government interests related to building voter confidence and protecting the integrity of our electoral system.[8] Sections 201 and 212 help prevent circum-

[8] The Court's decisions in *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334 (1995), and *Buckley v. Am. Constitutional Law Found., Inc.*, 525 U.S. 182 (1999), are not to the contrary. Those decisions concerned state regulations of voter initiatives and referenda, and neither state government produced evidence that it had acted on the basis of a substantial correlation between disclosure and the eradication of electoral fraud and informational distortion. Indeed, the majority in *McIntyre* reiterated the Court's earlier statements that in "candidate

vention of Title II's restrictions on coordinated expenditures by providing information concerning the sources of funding for electioneering communications in support of a candidate. Similarly, section 311's requirement that an advertisement's sponsors be clearly identified also enhances the ability of voters to evaluate the information presented to them and the candidates. Such identification and source information enables the public, the media, and regulatory authorities to investigate connections between candidates and their financial supporters—connections that are of interest to the public both during the election, when contribution limits might be triggered, as well as after the election, when the public would be alerted to the potential for corruption. The disclosure requirements also serve as a deterrent to illegal conduct and facilitate enforcement of campaign finance and anti-corruption laws.

In addition, BCRA's expanded disclosure requirements advance informational interests, long recognized by this Court, in helping voters to evaluate candidates and predict their future conduct once in office. Voters are better positioned to ascertain a candidate's place within the

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elections" the government can pursue its compelling interest in decreasing corruption and that "[d]isclosure of expenditures lessens the risk that individuals will spend money to support a candidate as a *quid pro quo* for special treatment after the candidate is in office." 514 U.S. at 356. As Justice Ginsburg's concurring opinion observed, "[i]n for a calf is not always in for a cow," and the Court's decision that a single pamphleteer commenting on a school tax levy up for consideration by local referendum did not have to disclose herself as author "d[id] not thereby hold that the State may not in other, larger circumstances require the speaker to disclose its interest by disclosing its identity." *Id.* at 358.

political spectrum and the interests to which the candidate is likely to respond later if they are informed about the identities of groups and individuals providing financial support to that candidate. *Buckley*, 424 U.S. at 66-67.

CONCLUSION

For the foregoing reasons, *amici* respectfully submit that (1) BCRA advances the government's compelling interests in building public confidence in the ability of ordinary citizens to participate meaningfully in the political process, encouraging active citizen participation, eliminating corruption and its appearance, and minimizing the perception of undue influence in the political process, and (2) the Court accordingly should uphold BCRA in all respects as a constitutional exercise of Congress's power to regulate federal elections.

Respectfully submitted,

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August 5, 2003